IN THE MATTER OF ARBITRATION BETWEEN

Weyerhaeuser Company	)	**FMCS Case No. 061026-50599-7**
	)	
"Employer"	)	**Issue: Alcohol Abuse/Dismissal**
	)	
	)	**Hearing Date: 02-03-06**
and	)	
	)	**Brief Submission Date: 03-24-06**
	)	
United Food and Commercial Workers, AFL-CIO, Local 9	)	**Award Date: 05-22-06**
	)	
	)	**Mario F. Bognanno,**
"Union"	)	**Arbitrator**
	)	

JURISDICTION

The hearing in this matter was held on February 3, 2006, in Austin, Minnesota. The parties appeared through their designated representatives. Both parties were afforded a full and fair opportunity to present their case. Witnesses were sequestered, sworn and their testimony was subject to cross-examination. Exhibits were introduced into the record. A verbatim transcription of the hearing was prepared. The parties stated the grievance was properly before the Arbitrator for a final and binding determination.

Mr. Tony Orman attended the hearing under the auspices of the State of Minnesota, Bureau of Mediation Services' arbitrator-internship program. In his capacity of intern, Mr. Orman prepared a preliminary draft of this decision. Ultimately, however, the undersigned prepared and is responsible for this opinion and award. Post-hearing briefs were submitted on or about March 24, 2006, and thereafter the matter was taken under advisement. Finally, it was requested that initials identify the Grievant.

APPEARANCES

For the Employer:

Bruce MacPhee	Attorney
Mark Ruhter	Maintenance Manager
Thomas Pike	Production Supervisor
James Hansen	Shift Steward and Laborer
Robbin Knudtson	Austin, Human Resources Manager
Robert Lovelady	Plant Manager
Scott Westphal	Laboratory Technician, Austin Medical Center. Telephonic testimony.

For the Union:

Brendan Cummins	Attorney
Dan Bartel	Business Agent
Richard Morgan	Union President
B. J.	Grievant

I. BACKGROUND AND FACTS

The Grievant, B. J., is a six-year employee of the Company, who worked as a third shift [10:30 p.m. – 6:30 p.m.] maintenance mechanic until he was discharged effective July 13, 2005, for substance abuse. (Joint Exhibit 2). On July 12, 2005, the Grievant reported to work late, around 11:15 p.m., having previously called the second-shift mechanic to report that he would be late. Upon arriving at work, the Grievant the walked over to James Hansen, the third-shift Union steward who was conversing with a vendor. Mr. Hansen testified, without

contradiction, that while the Grievant was standing next to him, the Grievant was "teetering" from side-to-side; he "bounced off" the plant's wall with his shoulder as he walked into the plant; and walked angularly and slowly. The Grievant testified that when he arrived at the plant he was having back spasms for which he had been taking medication. To relieve his aching back, the Grievant testified that he went to the Parts Shop on the plant's second floor where he proceeded to lie flat on the floor and fall asleep.

Sometime after 12:30 a.m., on July 13, 2005, Mr. Thomas Pike, Production Supervisor, paged the Grievant twice, but to no avail. He asked Mr. Hansen to find the Grievant for him, as he was the only maintenance mechanic and licensed boiler operator on the shift. Mr. Hansen found the Grievant in the Parts Shop. (Company Exhibits 1, 2 and 3). Mr. Hansen testified that the Grievant was lying on the Parts Shop floor. After checking his breathing and for signs of injury, Mr. Hansen tried to awaken the Grievant by shaking and calling out to him. The Grievant opened and closed his eyes once. His eyes, Mr. Hansen testified, were "red and glassy."

Mr. Hansen returned to the Parts Shop with Mr. Pike, having advised him that the Grievant was "passed out." The Grievant was still lying of the floor. Mr. Pike testified that the two men shook the Grievant's shoulders and called out his name, trying to awaken him. At one point, Mr. Pike stated, the Grievant "... looked up…and just rolled back over and went to sleep."

Next, Mr. Pike called Mr. Mark Ruhter, a licensed boilermaker, and the plant's Maintenance Manager. Upon arriving, the latter photographed the

Grievant, as he lay on his back on the floor. (Company Exhibits 4 and 5). Mr. Ruhter testified that when he first walked into the Parts Shop he could smell alcohol. The evidence quite clearly establishes that the three men, Messrs. Hansen, Pike and Ruhter, after some time managed to awaken the Grievant who showed definite signs of inebriation. The testimony suggests that the Grievant got up in stages. With assistance and intermittent pauses, the Grievant first sat up, stood up and then walked to a chair where he sat down. Mr. Ruhter testified that he next told the Grievant he would need to be "…sent down for a drug test".[1] Mr. Pike escorted the Grievant to the Austin Medical Center (AMC) for testing.

At the hospital the Grievant submitted to a urine sample and urinalysis, but refused to take a Breathalyzer test when asked to do so by Scott Westpahl, AMC Laboratory Technician.[2] (Company Exhibit 6). Mr. Westpahl testified that he told the Grievant that according to the Company's substance abuse policy, he had to take both tests, and refusal to test would be interpreted as a "positive" test result.

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[1] Further, Mr. Ruhter testified that he could not remember whether he also directed the Grievant to take the Breathalyzer test.

[2]Apparently, within the framework of the Company's substance abuse protocol, the urine sample and urinalysis test (UA) is used to screen for prohibited drugs; whereas, the Breathalyzer test is used to test for an excessive level of alcohol. Moreover, a North Carolina firm, LabCorp, manages the Company's drug screens, which are performed by a Kansas City, MO firm, Chem Review; while AMC does its own Breathalyzer tests. In evidence are two copies of the LabCorp "chain of control" form, Union Exhibits 3 and 4. The copy of the form that the AMC gave to the Grievant shows that the Employer requested only a "Urine Drug Screen". (Union Exhibit 3). The other copy, taken from the Employer's business records, shows that the Employer requested a "Urine Drug Screen" and "Urine Alcohol Level". (Union Exhibit 4). Except for this difference, the forms are identical. The undersigned is both puzzled and troubled by this difference. The record does not explain *why* one copy of the same form calls for an Urine Alcohol Level test and the other does not. Nor does it indicate *who* added the request for the Urine Alcohol Level test to the original form, Union Exhibit 3, and *whether* Chem Review actually performed a Urine Alcohol Level test.

(Joint Exhibit 9). The Grievant testified that Mr. Ruhter directed him to take a UA test, which he took. He also stated that when the "intern" (presumably Mr. Westphal) asked him to take a Breathalyzer:

> I turned to Tommy [Pike] and I asked him, I say, Well, you wanted a UA. I said, Do I have to take this Breathalyzer. And he said, No, you are here for a UA, that's all I know that you need to take. So that what I did. We got our copies of the paper and we left.

(TR at p. 61.) The "paper" being Union Exhibit 3. (Reference footnote 2 above). Mr. Pike's account of this exchange is as follows:

> When we got to the hospital, [B. J.] got his paperwork filled out prior to going back. Him and I went back to the rooms where they did the … there were two rooms. An examination room. Then right across the hall was a bathroom.
>
> And right away they gave him a container and told him to urinate in it. Which he went across and did. Then they asked for a Breathalyzer test. And [B. J.] said, I just gave you UA, what do I need to do a Breathalyzer for. And I didn't make out exactly what the doctor (presumably Mr. Westphal) said next , or the physician or …
>
> …Then the next thing that I remember is that the tech just said, Okay, that's all I need then. You guys are free to go.

(TR at page 30.) On cross-examination, Mr. Pike stated that neither he, nor anyone else from the Company, asked the Grievant to take the Breathalyzer test. In addition, on redirect examination, Mr. Pike stated that he did not recall Mr. Westphal saying anything about the Company's substance abuse policy.

Thereafter, Mr. Pike drove the Grievant home. The next day, Mr. Ruhter contacted the Grievant, telling him not to return to work until further notice and he began his investigation of the matter, determining that although the urine drug screen test was negative, the Grievant's conduct on July 12th and 13th warranted his termination, effective July 13, 2005. A letter to that effect is dated July 18,

2005. (Joint Exhibit 2). On July 19, 2005, the Union grieved the termination. (Joint Exhibit 3). In response to the Union's Step 4 appeal of the grievance, on September 2, 2005, the Employer replied:

> The union's request to reinstate [B. J.] as a Weyerhaeuser employee is denied. Weyerhaeuser has already extended [B. J.] the last chance agreement and rehabilitation in the past.

(Joint Exhibit 7). Unable to resolve this matter, on September 30, 2005, the Union advanced the case to arbitration. (Joint Exhibit 8).

II. THE ISSUE

Was the Grievant terminated for just cause? If not, what is an appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS AND GOVERNING RULES

ARTICLE 4 – RESPONSIBLITIES OF MANAGEMENT

> SECTION 1. The management of the plant, the establishment of the Company rules; the direction of the working forces, including the right to plan, direct and control all productive and other operations; to hire, suspend and discharge employees for cause …

(Joint Exhibit 1).

Substance Abuse Standard – U.S. Only

Standard. ***

> Use of controlled substances (including alcohol) on company premises is grounds for termination.

For Cause Testing. ***

> An employee who tests positive may be allowed only one last-chance agreement during the course of his/her employment. This does not eliminate termination as an option.

Refusal to Take a Test. ***

> An employee's refusal to take a drug and/or alcohol test in accordance with these guidelines will be regarded as a positive test and/or an act of insubordination and may subject the employee to appropriate disciplinary measures up to and including termination. ***

(Joint Exhibit 9).

IV. POSITION OF THE EMPLOYER

The Employer initially contends that the Grievant's work areas have high speed machines and boilers and their maintenance can be dangerous and that on July 12 and 13, 2005, the Grievant was unable to perform his duties. He was passed out, intoxicated, on the Parts Shop floor.

The Union does not admit that the Grievant was under the influence of alcohol that night, yet the Employer argues, the photographic evidence supported by the testimonies of Messrs. Hansen, Pick and Ruhter, proves that he was. (Company Exhibits 4 and 5). These men variously confirmed that the Grievant was unstable, glassy and red-eyed, passed out flat on his back and resistant to being awakened, and there was an odor of alcohol about him. Further, the Employer avers that the reason it lacks objective, chemical, evidence of his inebriated condition was because the Grievant refused to take the Breathalyzer test that Mr. Westpahl attempted to administer. Nevertheless, however, as spelled out in the Company's substance abuse policy, the Employer points out that the Grievant's refusal to take the Breathalyzer test is properly treated as a "positive" result and grounds for his termination. The Grievant was aware of this policy proscription because Mr. Westpahl had advised him of it and because he

had previously received and signed for a copy of the Company's substance abuse policy. (Company Exhibit 7).

In addition, the Employer notes that on July 16, 2002, the Grievant was given a 1st Warning for missing two days of work for being jailed because of a DWI arrest. (Union Exhibit 1). Also, on that same day, at a meeting between the parties, it was pointed out that although the Grievant was already enrolled in an outpatient treatment program, obviating the need for EAP Assistance, he was nevertheless subject to random testing for one year. (Union Exhibit 2). The Employer urges that the upshot of this meeting was an implicit or tacit "last chance" agreement.

Next, the Employer contends that the Grievant was not entitled to protection under Minnesota Statue Section 181.953, Subdivision 10. Rather, the Employer argues that by law the Grievant was not entitled to an opportunity for rehabilitation and reemployment because he had previously been afforded said opportunity. Finally, for the above reasons, the Employer begs that the grievance be denied.

V. POSITION OF THE UNION

The Union initially argues that the Employer carries the burden of proving that the Grievant insubordinately refused to take the Breathalyzer test in violation of its substance abuse policy. The Union points out that neither Mr. Ruhter nor Mr. Pike, who accompanied the Grievant to the AMC, directed him to take the Breathalyzer test.

In addition, the Union continues, that Mr. Pike did not contest the Grievant's account that, when asked, Mr. Pike told him that he did not have to take the Breathalyzer test; and that even if Mr. Westpahl made reference to the Company's substance abuse policy, a point in contention, he lacks managerial authority. Further, even if the Grievant's refusal to take the alcohol test is treated as a "positive test", it would have been his "first" positive test result. This, the Union contends, is not grounds for terminating the Grievant because the *Minnesota Drug and Alcohol Testing in the Workplace Act*, Minn. Stat. §181.953, Subd. 10, requires that first-offense employee must be given an opportunity to undergo drug or alcohol treatment and a "second chance". Still further, the Union urges that the Grievant has never been subject to a "last chance" agreement, as the Employer suggests.

Finally, the Union argues, the "chain-of-custody" form reviewed by the Employer calls for a "urine alcohol level", yet said test results were not produced. (Union Exhibit 4). For these reasons, the Union asks that the Grievant be reinstated and "made whole."

V. DISCUSSION AND OPINION

This decision involves a two-step analysis, namely: to determine whether the Grievant is guilty of violating the Company's substance abuse policy; and, if so, under all relevant facts and circumstances, was terminating his employment an appropriate remedy. These analytical steps are discussed in the order presented.

Substance Abuse

On October 7, 1999, the Grievant signed a form acknowledging receipt of the Company's substance abuse policy. (Company Exhibit 7). Said signature is acknowledgment that the Grievant had "received and read" the policy; that he would "cooperate in the implementation and enforcement" of the policy; and that failure to cooperate could "result in disciplinary action, up to and including discharge". (Joint Exhibit 9). Indeed, there is evidence that the Grievant received a second copy of the substance abuse policy on or about July 16, 2002, when he and the Union steward, Mr. Hansen, met with Mr. Ruhter and another Company representative to discuss his receipt of a 1st Written Warning for missing two days of work for a DWI. (Union Exhibits 1 and 2). Accordingly, the undersigned concludes that the Grievant was well versed in the nuances of the Company's substance abuse policy and, particularly, that to refuse to take a Breathalyzer test is equivalent to tested positive for alcoholism.

The Employer offers the testimony of Mr. Westphal, who stated that he told the Grievant that to be in conformity with the Company's substance abuse policy he would have to take a Breathalyzer test in addition to the urinalysis, but he refused. On the other hand, the Union argues that the Grievant complied with Messrs. Ruhter and Pike's directions, which were that he was to take a drug test (a/k/a UA). Mr. Ruhter did not mention a Breathalyzer test and Mr. Pike told the Grievant that he did not have to take a Breathalyzer test because he was there for a urinalysis test. Further, the Union argues that Mr. Pike's direction as a Company supervisor superceded Mr. Westphal's direction because he is not

even a Company employee. Therefore, the Union concludes, that the Grievant's refusal to take a Breathalyzer test was legitimate and should not be treated as a positive result; that nothing in the record suggests that the Grievant tested positive on the Company-ordered "Urine Alcohol Level" test; and that the Grievant tested negative on the drug screens. (Union Exhibits 4 and 5).

After a thorough review of the record evidence, the undersigned concludes that the Grievant did violate the Company's substance abuse policy on the night of July 12 and 13, 2005. That the Grievant reported to work on July 12, 2005, in an inebriated state is the only conclusion that can be reached, based on the ***physical*** evidence in the record. Specifically, the pictures showing him lying on his back on the Parts Shop floor, eyes closed, with his arms on his chest, plus the corroborating and uncontroverted testimonies of Company representatives Messrs. Ruhter and Pike and Union representative Mr. Hansen, all point to the conclusion that the Grievant was passed out from drunkenness and not lying unconscious due to an accident, heart attack or any other health-related malady. Clearly, the Employer had reasonable cause to order testing that would have provided ***objective*** evidence of intoxication.

Whether the Grievant was tested for alcoholism, is an open question. On the one hand, the Grievant refused to take a Breathalyzer test and, on the other hand, the Company requested a "Urine Alcohol Level" test, the result of which is not in evidence. The record associated with both of these observations is contradictory and puzzling, respectively. Nevertheless, the undersigned is convinced by a preponderance of evidence that the Grievant was intoxicated, as

the Employer alleges, on July 12 and 13, 2005. It is sufficient to know that the Grievant knew that it was a policy violation to report to work in an intoxicated state. There is no need to address the following technical points: first, whether Mr. Westphal was an "agent" of the Company with respect to the administration of its substance abuse collection and testing processes and, if he was, then the Grievant 's refusal to be tested would amount to a positive result; and, second, whether and how much weight to give the fact that Union Exhibits 3 and 4 are mysteriously different.

Accordingly, in this case, the record's physical evidence is sufficiently damning to prove that the Grievant violated the Company's substance abuse policy on July 12 and 13, 2005. This finding begs the question, "Is this the Grievant's first or second violation?" The Employer argues that this is the Grievant's second substance abuse violation, pointing to the facts and circumstances surrounding the Grievant's 2002 DWI incident. The Company notes that the Grievant missed two days of work because he was incarcerated for driving while intoxicated; that the Grievant was in outpatient treatment at the time, which is why the Company did not send him to EAP services; and that he was informed that he would be randomly tested for a period on one year. The Employer urges that these considerations sum to an implicit "last chance" agreement or a "second chance" opportunity.

The undersigned is not persuaded by the Employer's argument. What transpired on July 16, 2002, does not add up to a "last chance" agreement or a "second chance" opportunity. First, the Grievant was not under the influence

while at work or on Company premises, and he was not driving a Company vehicle at the time of the DWI. Second, the Warning Notice the Grievant received for having missed two days of work was treated as an attendance problem for which he was issued a 1st Warning. The notice does not reference the Company's substance abuse policy. (Union Exhibit 1). Third, while discussing this matter, the parties apparently did touch on the Company's substance abuse policy with reference to EAP assistance and random drug testing; however, the Grievant was a self-referral to alcohol out-patient treatment and the Grievant was never, in fact, randomly tested. Finally, the Company's substance abuse standards note, in part:

> Periodic, unscheduled testing will be conducted on all return-to-work contract for a minimum of 24 months. Standardized formal referral agreement and return-to-work agreement forms will be used.

(Joint Exhibit 9). In this case, it is clear that the Grievant was not put on an unscheduled testing schedule of 24 months in duration and that a standardized return-to-work (a/k/a "last chance") agreement was not entered into.

Remedy

As discussed above, in the opinion of the undersigned, the Grievant's July 12 and 13, 2005, substance abuse infraction was a first violation. This finding has special significance in light of the *Minnesota Drug and Alcohol Testing in the Workplace Act*, Minn. Stat.§181.953, Subd.10, that requires Minnesota employers to give first-offenders the opportunity to enter substance abuse treatment in lieu of termination.

An often used standard for interpreting contract language is that said language should be interpreted in light of public policy – the law. Accordingly, in light of the referenced statute, the "for cause" provision in article 4 of the Collective Bargaining Agreement and the "For Cause Testing" language in the Company's Substance Abuse Standard – U. S. Only policy are interpreted to mean that prior to terminating a first-offender for substance abuse, as is the Grievant in this case, an employer must first give him an opportunity to enter treatment. Accordingly, in this instance, the Grievant was not terminated for just cause.

VII. AWARD

For the reasons set forth above, the Employer did not have just cause for dismissing the Grievant. Accordingly, under the following conditions, the Employer is ordered to return the Grievant to work, purging his personnel file of Joint Exhibit 2, the letter of termination:

1. The Grievant must agree to enter a medically certified substance abuse program, at the Employer's expense, and enter into a "standardized formal referral agreement" (Joint Exhibit 9);
2. The Grievant must enter into a "last chance" or "return-to-work agreement" (Joint Exhibit 9);
3. The Grievant's return to work shall commence on the date the Grievant enters into a medically certified substance abuse program;

4. The time lapse between the Grievant's dismissal date and the date of his entry into a medically certified substance abuse program shall be treated as a period of unpaid suspension without benefits; and
5. If the Grievant is unwilling to enter a medically certified substance abuse program, his termination will be sustained.

The undersigned shall retain jurisdiction over the case through the end of the business day on July 21, 2006, for the limited purpose of overseeing the intended implementation of this Award.

Issued and ordered on this 22nd day of May 2006, from Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator